

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

**FELIPE SANCHEZ**

Claimant

VS.

**GREDE FOUNDRIES, INC.**

Self-Insured Respondent

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Docket No. 1,050,587

**ORDER**

Respondent appealed the June 30, 2010, preliminary hearing Order entered by Administrative Law Judge Nelsonna Potts Barnes.

**ISSUES**

Claimant alleges he injured his back and right leg from repetitive lifting and overuse while working for respondent through March 5, 2010,<sup>1</sup> when respondent closed its plant. In the June 30, 2010, Order, Judge Barnes agreed and found that claimant had provided respondent with timely notice of accident on May 17, 2010, when respondent received a written claim for benefits.<sup>2</sup> Consequently, the Judge awarded claimant medical benefits and, if taken off work, temporary total disability benefits.

Respondent contends the Order should be reversed as claimant failed to prove he injured his back at work in a series of accidents or that he provided timely notice for that alleged series. Moreover, if claimant has sustained a repetitive trauma injury, respondent maintains the date of accident would be either March 1 or 5, 2010, when claimant last worked for respondent. Respondent also contends that claimant fell at work several years ago, but he did not pursue workers compensation benefits for that incident, did not submit a written claim, and did not make timely application for hearing.

Claimant argues that he fell at work approximately three years ago and his back pain worsened as he continued to work for respondent. He also maintains that for the last five months he worked for respondent he drove a forklift, which considerably worsened his

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<sup>1</sup> Application for Hearing (filed May 5, 2010).

<sup>2</sup> P.H. Trans. at 6.

back symptoms and even caused right leg pain. In short, claimant argues his injury is from repetitive overuse created by years of hammering, repetitively lifting more than 50 pounds, and from driving a forklift for 12-hour days over uneven surfaces and potholes. In addition, claimant contends the date of accident under K.S.A. 44-508(d) is May 17, 2010, when he gave respondent written notice of his injury. Accordingly, claimant argues he has provided timely notice of accident. In summary, claimant believes the June 30, 2010, Order should be affirmed.

The issues before the Board on this appeal are:

1. Did claimant injure his back while working for respondent as the result of repetitive trauma that he sustained through his last day of work?
2. If so, what is the date of accident and did claimant provide respondent with timely notice of that accident?

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

After reviewing the record compiled to date, the undersigned Board Member finds the preliminary hearing Order should be affirmed.

Claimant worked for respondent for more than 25 years before it closed its foundry in early 2010. Respondent made parts and for 20 years claimant used hammers weighing from 6 to 12 pounds to knock the excess metal from the manufactured part. The heavier parts that claimant handled and lifted weighed from 25 to 50 pounds, or more.

Claimant experienced back symptoms approximately three years ago when he fell at work. He reported the incident to respondent, but he did not seek medical treatment. And years before that incident, claimant injured his back at work while moving a machine and received a year of therapy.<sup>3</sup> But claimant returned to his regular work duties after both incidents.

Since the fall at work, however, claimant's back symptoms progressively worsened. He also experienced pain into his right leg and developed a limp. Claimant testified his back symptoms and right leg pain significantly worsened when in November 2009 his job changed and he began operating a forklift. Claimant maintains he drove the forklift 12 hours per day and drove over potholes, which caused him to hurt more. But claimant did not report his increased symptoms to respondent as he felt respondent's management

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<sup>3</sup> *Id.*, Resp. Ex. 1 at 16, 17.

would be upset. Claimant testified at his discovery deposition he was afraid to report injuries to respondent as he might be fired.<sup>4</sup>

Since leaving work claimant believes his symptoms have worsened due to inactivity. He testified that approximately one week after respondent's plant closed he had an incident at home when his back pain prevented him from standing up from a seated position on his couch.

Although respondent contends there is some question whether claimant's present back symptoms are directly related to the incident at home rather than his work, claimant provided some clarification on redirect examination. He testified, in part:

Q. (Mr. Seiwert) Mr. Sanchez, which caused more pain in your back and right leg? Was it driving the forklift or getting up from the couch after you had lost your job?

A. (Claimant) Driving the forklift is what bothered me more. I was using my right leg for the gas pedal and the brake all the time.

Q. And did that cause more pain to you than trying to get up from the couch?

A. I think so. The couch was because I wasn't doing any exercise anymore. But I had other pain before that. Sometimes getting off the forklift, I had this limp, it hurt.<sup>5</sup>

Claimant, who has a sixth grade education from Mexico, testified through an interpreter.

The undersigned finds that claimant has established it is more probably true than not that he injured his back at work in a series of accidents or repetitive traumas through his last day of employment with respondent. Under K.S.A. 2009 Supp. 44-508(d), the date of accident for claimant's repetitive trauma injury is May 17, 2010, when respondent stipulated it received written notice of the injury. The legislature has recognized the difficulty in determining the appropriate accident date for repetitive trauma injuries, which may occur over extended periods of time and, therefore, the legislature enacted K.S.A. 2009 Supp. 44-508(d), which states:

"Accident" means an undesigned, sudden and unexpected event or events, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. The elements of an accident, as stated herein, are not to be construed in a strict and literal sense, but in a manner

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<sup>4</sup> *Id.*, Resp. Ex. 1 at 19.

<sup>5</sup> *Id.*, at 23, 24.

designed to effectuate the purpose of the workers compensation act that the employer bear the expense of accidental injury to a worker caused by the employment. In cases where the accident occurs as a result of a series of events, repetitive use, cumulative traumas or microtraumas, the date of accident shall be the date the **authorized physician takes the employee off work** due to the condition **or restricts** the employee from performing the work which is the cause of the condition. In the event the worker is not taken off work or restricted as above described, then the date of injury shall be the earliest of the following dates: (1) The date upon which the **employee gives written notice** to the employer of the injury; or (2) the date the condition is **diagnosed as work related, provided such fact is communicated in writing to the injured worker**. In cases where none of the above criteria are met, then the date of accident shall be determined by the administrative law judge based on all the evidence and circumstances; and in no event shall the date of accident be the date of, or the day before the regular hearing. Nothing in this subsection shall be construed to preclude a worker's right to make a claim for aggravation of injuries under the workers compensation act.<sup>6</sup>

The earliest of the benchmarks set forth in the above statute is when claimant provided written notice of his accidental injury. That date is May 17, 2010.

Because the date of accident is the date claimant provided written notice of the accidental injury to respondent, there is no question claimant has complied with the general requirement that notice be given within 10 days after the accident.<sup>7</sup>

In summary, the June 30, 2010, preliminary hearing Order should be affirmed.

By statute the above preliminary hearing findings are neither final nor binding as they may be modified upon a full hearing of the claim.<sup>8</sup> Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2009 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.<sup>9</sup>

**WHEREFORE**, the undersigned Board Member affirms the June 30, 2010, preliminary hearing Order entered by Judge Nelsonna Potts Barnes.

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<sup>6</sup> K.S.A. 2009 Supp. 44-508(d) (emphasis added).

<sup>7</sup> See K.S.A. 44-520.

<sup>8</sup> K.S.A. 44-534a.

<sup>9</sup> K.S.A. 2009 Supp. 44-555c(k).

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of September, 2010.

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CAROL L. FOREMAN  
BOARD MEMBER

c: Joseph Seiwert, Attorney for Claimant  
Gary K. Jones, Attorney for Respondent  
Nelsonna Potts Barnes, Administrative Law Judge